Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1975

No. 75-999

COLORADO SPRINGS AMUSEMENTS, LTD., trading as VELVET TOUCH, and LAUREL BEZNER, JACQUELINE BELL, GERALDINE STEVENS, SANDRA C. ROWLAND, et al.,

Petitioners,

vs.

MAYOR FRANK L. RIZZO, POLICE COMMISSIONER JOSEPH F. O'NEILL, POLICE OFFICERS POWELL, DE VECCHIO, and DE LOACH, et al.,

Respondents.

MAX RUBINSTEIN, trading as PHILADELPHIA HEALTH CLUB, and NICOLE JONES, DELORES REMENTER, JEANA NICHOLSON, LENORE SPENCE,

Petitioners,

vs.

MAYOR FRANK RIZZO OF THE CITY OF PHILADELPHIA, F. EMMETT FITZPATRICK, DISTRICT ATTORNEY OF THE CITY OF PHILADELPHIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

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No.

COLORADO SPRINGS AMUSEMENTS, LTD., trading as VELVET TOUCH, and LAUREL BEZNER, JACQUELINE BELL, GERALDINE STEVENS, SANDRA C. ROWLAND, et al.,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The herein petitioners respectfully pray that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled matter on October 16, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit dated October 16, 1975, is officially reported at 524 F.2d 571 (1975), and is printed in the Appendix hereto (1a). The opinion of the United States District Court for the Eastern District of Pennsylvania is officially reported at 387 F. Supp. 690, and is printed in the appendix hereto (13a).

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 16, 1975 and is printed in the Appendix being the last line of the said Court's opinion. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Was it not error for the court below to refuse to consider on the merits whether or not the municipal ordinance in question was constitutional in light of all the various arguments presented by petitioners before the United States District Court solely on the basis that the Supreme Court,

approximately two (2) years ago, had dismissed certain appeals before it. *i.e., Smith v. Keator*, 419 U.S. 1043 (1974); *Rubenstein v. Cherry Hill*, 417 U.S. 963 (1974); and four (4) years ago had dismissed the appeal of *Kisley v. City of Falls Church*, 409 U.S. 907 (1972) for lack of a substantial federal question?

2. Did the court below err both in its determination that the herein ordinance was not preempted by the comprehensive state legislation and therefore also not violative of due process?

3. Since the court below determined that the Philadelphia Ordinance was facially constitutional, should said court have found as a matter of record that the action of *Max Rubenstein et al. v. Rizzo et al.* came within the ordinance's exemption?

STATUTORY PROVISION INVOLVED

The statutory provision involved is Philadelphia Ordinance Bill No. 2524, Philadelphia Code 9-610 and 9-611 and is printed in the Appendix hereto (33a).

STATEMENT OF THE CASE

The City of Philadelphia had in effect at the time the herein two (2) cases were instituted, a local ordinance which allegedly provided for the licensing and regulating of massage salons. Such ordinance absolutely precluded any of the employees of the said massage salons from massaging persons of the opposite sex. Said ordinance did provide certain exemptions set forth in §9-610(5) (34a), one of which applied to D.C. Civil Action No. 74-2174 inasmuch as the proprietor was a licensed physical

therapist. The two separate actions were consolidated by agreement of counsel for the respective parties. Immediately subsequent to said consolidation, it was stipulated by and among counsel that any and all preliminary and/or jurisdictional objections would be waived so that a speedy resolution of the facial constitutionality of the said ordinance could be determined by the United States District Court for the Eastern District of Pennsylvania. Briefs were submitted by counsel to the United States District Court.

On December 5, 1974, U.S. District Judge Donald Van Artsdalen of the United States District Court for the Eastern District of Pennsylvania handed down his Opinion and Order (13a). Judge Van Artsdalen declared Philadelphia Code 9-610(4), Prohibited Conduct, to be in violation of Section 1, Article 14 of the United States Constitution, *i.e.*, the Due Process and Equal Protection Clauses. The findings of fact made no mention of the number of employees yet did find that Max Rubenstein was a licensed physical therapist (17a). The District Court found the City Ordinances to be so reprehensible as to be unconstitutional regardless of the standard applied, *i.e.*, compelling state interest or the rational basis standards after consideration of all of the petitioners' multifaceted arguments. The City of Philadelphia appealed to the United States Court of Appeals for the Third Circuit. Said Court of Appeals reversed the United States District Court's ruling solely, with exception of the preemption doctrine and Civil Rights Acts issues, on the basis that denial of an appeal by the Supreme Court for lack of a substantial federal question is a decision of the merits citing *Hicks v. Miranda*, 43 L.W. 4857.

REASONS FOR GRANTING THE WRIT

I.

There is no substantial dispute that theoretically, an "appeal" to the United States Supreme Court confers obligatory jurisdiction upon the Court, whereas when review can only be sought by certiorari, jurisdiction is discretionary. However, as former Chief Justice Warren stated as far back as 1954, the difference between the two methods of obtaining review by the highest court in the land may be de minimus:

> "It is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary on certiorari. As regards appeals from state courts our jurisdiction is limited to those cases which present substantial federal questions. In the absence of what we consider substantiality in the light of prior decisions, the appeal will be dismissed without opportunity for oral argument. The stated purpose of the Jurisdictional Statement, which came into being in 1928, was to weed out frivolous appeals before they got to the argument stage.
>
> Very few appeals from federal district courts are subject to dismissal for want of jurisdiction but many do not present a question sufficiently substantial to warrant the expense of printing the record and briefs, and the expenditure of the time

> of counsel and the Court in oral argument. In such cases, the judgment will be affirmed." (Address of Chief Justice Warren, American Law Institute Annual Meeting, May 19, 1954.)

The refusal of the Supreme Court to review cases on the merits which theoretically invoked the Court's obligatory jurisdiction, *i.e.*, appeal, is not a novel or recent occurrence. In *Zucht v. King*, 260 U.S. 174 (1922), the Court dismissed a case brought to it by appeal saying:

> "Although the validity of a law was formally drawn is question, it is our duty to decline jurisdiction whenever it appears that the Constitutional question presented is not . . . substantial in character" (at 176). (Also see *Equitable Life Assurance Society v. Brown*, 187 U.S. 308; *Sugarman v. United States*, 249 U.S. 182.)

In accordance with the above, Rule 12 was adopted in 1928, (see 275 U.S. 603-604, October Term, 1927 Revised Rules), which was extended to embody the principle previously referred to in *Zucht v. King*, whereby the Court could ". . . decline jurisdiction . . ." if the question presented was not found to be substantial. This requirement of Rule 12 was explicitly set forth when Rule 12 was amended in 1936 by the Court (297 U.S. 733, October Term, 1935). The present Rules of the Supreme Court of the United States categorically set forth in a detailed manner what is meant by the requirement that a substantial federal question be present before ". . .briefs on the merits and oral

argument . . ." shall be permitted by the Court (Rules 15(1)(e) and (f), pp. 11-12 of the Rules of the Supreme Court of the United States, Adopted June 15, 1970, Effective July 1, 1970).

The viable differences between obligatory jurisdiction, *i.e.*, by writ of certiorari, have been subject to further illumination by both Justice Frankfurter, before his tenure on the Court and Justice Douglas. As Professor Frankfurter said in 1930:

> "Plainly, the criterion of substantiality is neither rigid nor narrow. The play of discretion is inevitable, and wherever discretion is operative in the work of the Court the pressure of its docket is bound to sway its exercise. To the extent that there are reasonable differences of opinion as to the solidity of a question presented for decision or the conclusiveness of prior rulings, the administration of Rule 12 operates to subject the obligatory jurisdiction of the Court to discretionary considerations not unlike those governing certiorari." (Frankfurter and Landis, *The Business of the Supreme Court at October Term, 1929*, 44 Harv. L. Rev. 1, 12-14 (1930).)

Mr. Justice Douglas, in *Finehan v. Waterfront Commission*, 347 U.S. 439 (1954), clearly recognized the merging of jurisdictional considerations regardless of the mode in which a case comes before the Court when he stated:

> "This case illustrates what I fear is a growing practice of diluting the Act of Congress which

> gives us jurisdiction of appeals. 28 U.S.C. §1253 et al. The Congress carved out a group of cases, of which this is one, that comes here of right and is not dependent, as are petitions for certiorari, on a vote of four Justices out of nine for an adjudication by the Court on the merits of the controversy. In recent years the Court has more and more dismissed or affirmed appeals, with no opportunity of counsel to make oral argument and without any opinion by the Court."

As further evidence of Mr. Justice Douglas' recognition that discretionary jurisdiction includes those cases that reach the Court by appeal as well as by certiorari, the Court's procedure for determining whether it will invoke its jurisdiction is essentially identical. *Ohio ex rel. Eaton v. Price,* 360 U.S. at 246 (1959). This is so even to the extent that the Court's "rule of four" is used for both appeals and certiorari cases that come before the Court, if four Justices vote to list the case for argument and briefs on the merits. However, those four Justices are in no way bound by their preliminary determinations.

Yet, Justice Brennan categorically states:

> "Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . . . 360 U.S. at 247. Yet the U.S. District Court involved herein, while noting that Kisley and Rubenstein were dismissed for lack of a substantial federal question, gave no precedential weight to them whatsoever! . . .the grant or

> denial of certiorari, as we have often said, expresses no intimation as to the merits of a case." 360 U.S. at 247, footnote 1.

Notwithstanding, *Hicks v. Miranda,* 43 L.W. 4857 (1975), can the precedential weight given to appeals from state courts be so drastically superior to that accorded petitions for certiorari when the method of analysis and time accorded are so similar? A former Supreme Court Justice, Mr. Justice Clarke, stated, in *Hogge v. Johnson,* 44 L.W. 2121 (4th Cir., August 19, 1975):

> "The Supreme Court's statements in *Hicks v. Miranda* . . . to the effect that such dismissals are decisions on the merits, seem to me to fly in the face of the long-established practice of the Court at least during the eighteen terms in which I sat. During that time, appeals from state court decisions received treatment similar to that accorded petitions for certiorari and were given about the same precedential weight. An unquestioning application of the *Hicks* rule can lead to nothing but mischief and place an unnecessary restraining hand on the progress of federal constitutional adjudications."

There is no dispute whatsoever, Justice Brennan noted, *supra,* that denial of a writ of certiorari casts not even the slightest shadow upon the merits of a particular case. (*State of Maryland v. Baltimore Radio Show,* 338 U.S. 912, 919 (1950); *Brown v. Allen,* 344 U.S. 443, 492 (1953); *United States v. Carver,* 260 U.S. 482, 490 (1923).) Therefore to rely upon

previous dismissals of appeals for lack of a substantial federal question especially regarding dismissals that were ruled upon over two (2) and four (4) years ago (10a), in and of itself presents a substantial federal question. The precedential value of such dismissals is further diluted when several members of the United States Court of Appeals for the Fourth Circuit, *Hogge v. Johnson, supra,* including a former Justice of the Supreme Court of the United States are of the opinion that ". . .there was a substantial federal question presented. . ." The herein matter presented all of the federal questions raised by the *Kisley* case, as well as every federal question raised by the other two cases, *i.e., Smith* and *Rubenstein, supra,* plus two others. One would be hard put to refute that these are not federal questions and it is respectfully submitted that the substantiality and outcome of these federal questions should be determined by the implementation of this Court's plenary jurisdiction as evidenced by the United States District Court's determination that the question involved herein raise substantial federal questions (13a-32a) and further by the lapse of time of the *Kisley* decision.

II.

The court below relies on *United Tavern Owners v. Philadelphia School District,* 441 Pa. 274 (1971) in ruling that the local ordinance has not entered an area of legislation which has been totally occupied by the Pennsylvania penal code. It then concludes that since the local ordinance is valid under the standard of preemption enunciated in the above-mentioned case, there can be no violation of due process. As to the issue of preemption, the court below fails to distinguish between local

legislation that merely "supplements" state legislation as opposed to local legislation that actually transcends the scope of the state legislation and in reality, effectuates a substantial prohibition in the business area which it is allegedly only regulating! Local legislation which effectuates a substantial prohibition under the guise of business regulation certainly conflicts with pervasive state legislation as was recognized in an identical factual setting. *Lancaster v. Municipal Court,* 494 P.2d 681 (1972). This concept was fully recognized and cited with approval in the same case relied upon by the court below, *United Tavern Owners of Philadelphia v. School District of Philadelphia et al.,* 272 A.2d at 871, in an analogous factual setting. Judge Vn Artsdalen, in declaring unconstitutional the herein local ordinance, recognized that this ordinance created a "blanket prohibition" (31a) regarding bisexual massage on the basis of a conclusive presumption that all would engage in illicit sex ". . . without affording any opportunity for one to establish that he or she would engage only in legal and legitimate massage practices . . ." (31a). Therefore, said ordinance is preventing individuals their "fundamental right" under the Fourteenth Amendment (*New State Ice Co. v. Liebmann,* 285 U.S. 262 (1932); *Truax v. Raich,* 239 U.S. 33 (1915)) from engaging in a lawful business without due process of law. It is respectfully averred that a substantial federal question is presented especially when considering that this ordinance is allegedly regulating the fundamental right one has to earn a livelihood in total disregard for due process of law. Can the respondents possibly contend that there are no alternative means by which the City's ends cannot be attained? Furthermore, the respondents alleged supplementing of state legislation goes so far as to qualitatively alter the scope, purpose, and intent of the state legislation.

III.

It is a matter of record that the United States District Court in the herein matter ruled of fact that Max Rubenstein is a licensed physical therapist. It was further determined that he operated a place of business, as a licensed physical therapist, known as the Philadelphia Health Club at 101 North 15th Street, Philadelphia, Pennsylvania. These findings of fact comprised part of Judge Van Artsdalen's Opinion and Order in which he ruled the ordinance in issue herein facially invalid and unconstitutional. The United States Court of Appeals had the entire record before it when it reversed the judgment of the district court. Therefore, it was incumbent upon the United States Court of Appeals that it accept the district court's findings of fact and rule that District Court Civil Action No. 74-2174 come within the exemption explicitly enumerated in §9-610(5) and find for the petitioners in said action, or in the alternative direct the United States District Court to determine such issue under the presumption that said establishment was exempted from the prohibition.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Michael Battaglini
Attorney for Petitioners

William J. Cottrell
Of Counsel

APPENDIX A
OPINION OF THE UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-1107 and 75-1108

COLORADO SPRINGS AMUSEMENTS, LTD. t/a VELVET TOUCH, 11 NORTH 13th STREET, PHILADELPHIA, PENNSYLVANIA 19107 and LAURAL BEZNER, JACQUELINE BELL, GERALDINE STEVENS, SANDRA C. ROWLAND, JACKIE SAVAGE, JOAN COOLEY, LINDA HAMPTON, and NICOLE ADAMS, JOELLEN STONE, SANDRA VIOLA, PENNY DAVIS, and DENISE BARNES and NANCY DOLLAR

v.

MAYOR FRANK L. RIZZO OF THE CITY OF PHILADELPHIA, JOSEPH F. O'NEILL, COMMISSIONER OF POLICE, DOMENICK SABATINI, COMMISSIONER OF LICENSES AND INSPECTIONS, THOMAS ROSELLI, COMMANDING OFFICER OF MORALS SQUAD, MARTIN WEINBERG, CITY SOLICITOR, LEWIS W. POLK, M.D., COMMISSIONER OF DEPARTMENT OF HEALTH, CAPTAIN BRENTON, COMMANDING OFFICER OF THE 6th DISTRICT, POLICE SGT. LYONS, POLICE SGT. SHAW, POLICE OFFICERS POWELL, DeVECCHIO, DeLOACH, FORD, ENGLISH, FELDMAN: All are named in their *individual* capacity as well as their *official* capacity

(D.C. Civil Action No. 74-955)

MAX RUBENSTEIN t/a PHILADELPHIA HEALTH CLUB, 101 N. 15th STREET, PHILADELPHIA, PENNSYLVANIA 19102 and NICOLE JONES, DOLORES REMENTER, JEANA NICHOLES, and LENORE SPENCE

v.

MAYOR FRANK L. RIZZO OF THE CITY OF PHILADELPHIA, EMMETT FITZPATRICK, DISTRICT ATTORNEY OF THE CITY, JOSEPH F. O'NEILL, COMMISSIONER OF POLICE, DOMENICK SABATINI, COMMISSIONER OF LICENSES AND INSPECTIONS, THOMAS ROSELLI, COMMANDING OFFICER OF MORALS SQUAD, MARTIN WEINBERG, CITY SOLICITOR, LEWIS W. POLK, M.D., COMMISSIONER OF DEPARTMENT OF HEALTH, CAPTAIN BRENTON, COMMANDING OFFICER OF THE 6th DISTRICT, POLICEMAN JOHN FORD; BOTH INDIVIDUALLY AND STATUTORILY,

(D.C. Civil Action No. 74-2174)

Mayor Frank Rizzo, Police Commissioner Joseph O'Neill, Police Officers Powell, DeVecchio and DeLoach, defendants in D.C. Civil Action No. 74-955, and Mayor Rizzo and District Attorney F. Emmett Fitzpatrick, defendants in D.C. Civil Action No. 74-2174,

Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA—D.C. CIVIL ACTION NOS. 74-955 AND 2174

Argued September 3, 1975

Before: VAN DUSEN, ADAMS and HUNTER, *Circuit Judges.*

LOUIS F. HINMAN, III
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JAMES M. PENNY, JR.,
Asst. City Solicitor
RAYMOND KITTY,
Deputy City Solicitor
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OPINION OF THE COURT

(Filed October 16, 1975)

ADAMS, *Circuit Judge.*

At issue in this appeal is the validity of an ordinance which prohibits employees of massage parlors licensed by a city from massaging anyone of the opposite sex.

I.

City Council of Philadelphia determined in 1963 that illicit sexual activities often occurred in the massage parlors located in the city.[1] Its concern for the community's health and morals led it to respond with an attempt to regulate the massage parlor business. This was done by enactment in 1963 of section 9-610 of the Philadelphia Code, followed by the enactment in 1967 of section

1. The City Council held hearings in 1963 at which testimony was given about this matter. Defendants' Memorandum Sur Motion for Summary Judgment at 3-5, filed in the district court during pendency of the action there.

9-611 of the Code. These sections establish a system of mandatory licensing for both the parlors themselves and those employees who work as masseurs or masseuses, subject to certain exceptions, combined with a system of penalties for violation of the ordinance. Section 9-610(4), which is challenged in this proceeding, provides:

> *Prohibited Conduct.* No person employed or engaged in the business of a masseur or masseuse shall treat a person of the opposite sex.

Plaintiffs in these two consolidated actions are owners of and masseuses at massage parlors licensed under section 9-610 of the Philadelphia Code. They filed complaints in 1974 against various city officials and police officers, asserting that the prohibition in section 9-610(4) violates, on its face, federal civil rights statutes, the equal protection and due process clauses, and the ninth amendment. Declaratory and injunctive relief, as well as money damages, were sought.

Upon plaintiffs' motion for summary judgment, the district court declared the ordinance's prohibition of heterosexual massages unconstitutional. The court reasoned that the ordinance fashioned a classification based upon gender and that there was no rational relationship between the prohibition and the object sought to be accomplished, thus making out an equal protection violation. The district court further concluded that the ordinance created an irrebuttable presumption that heterosexual massages would result in illicit sexual behavior, that this presumption is not a reasonable one, and that the ordinance therefore also violates the due process clause. An injunction was granted against enforcement of the ordinance,[2] and the defendants took this appeal. We reverse.

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2. It was not necessary to convene a three-judge district court under 28 U.S.C. § 2281 in order to enjoin enforcement of the local ordinance, since the statute applies "only when a state statute of general and statewide application is sought to be enjoined." Moody v. Flowers, 387 U.S. 97, 101 (1967).

II.

The city officials advance four basic arguments. First, they point out that the district court was incorrect in finding an equal protection violation, since the ordinance applies equally to both male and female massagists. Thus, the classification created by section 9-610(4) is neutral on its face, the city officials contend, and does not have a gender-based discriminatory effect. They then maintain that because the ordinance treats males and females identically, by prohibiting both from massaging anyone of the opposite sex, Supreme Court decisions such as Frontiero v. Richardson, 411 U.S. 677 (1973), and Reed v. Reed, 404 U.S. 71 (1971), which concern differential treatment of men and women, are not applicable.

A second line of attack by the city officials is that the Supreme Court has tacitly upheld the constitutionality of ordinances whose provisions are the same as those of section 9-610 in all material respects. This was accomplished by the Court's dismissal for want of a substantial federal question of four appeals from state court decisions upholding similar ordinances against challenges identical to those asserted here. The Supreme Court's recent decision in Hicks v. Miranda, 43 U.S.L.W. 4857, 4860 (U.S. June 24, 1975), is proffered for the rule that these four dismissals amount to adjudications on the merits.[3]

Also urged by the city officials is the contention that the ordinance is a valid exercise of the municipality's police power, in that it protects the health, safety, and moral welfare of the general public. In meeting this legitimate end, the argument continues, the ordinance does not arbitrarily deprive massage parlor owners of their property, but merely regulates the massage business in an inoffensive manner.

---

3. Although *Hicks* was not mentioned in their brief, the city officials cited it during oral argument. The plaintiffs were given an opportunity to submit their views regarding *Hicks* to the Court following the argument, and they filed a letter-brief.

Finally, the city officials submit that the Civil Rights Act of 1964 does not apply to the massage parlors here because there has been no allegation or proof that they have the requisite fifteen employees to bring them within the prohibitions of the Act. 42 U.S.C. § 2000e(b) (Supp. III, 1973).[4]

The massage parlor owners and employees present a multi-faceted line of argument in support of their assertion that the district court's judgment should be affirmed. Conceding that the ordinance on its face treats persons of both sexes equally, they first claim that it is nonetheless unconstitutional because legislation which treats members of each sex in an equally reprehensible manner denies equal protection of the laws to all. This contention has three branches. The first is that the legislation fails to consider individuals on the basis of their own capacities, and instead unreasonably characterizes the group to which individuals belong, in contravention of the rule set down in McLaughlin v. Florida, 379 U.S. 184, 191 (1964). The second is that section 9-610(4) establishes a constitutionally impermissible presumption that illicit sexual conduct is apt to occur when a customer is massaged by someone of the opposite sex. The third branch is that the ordinance creates a sex-based classification and invidiously discriminates on that basis.

The plaintiffs also suggest that enforcement of section 9-610(4) would require them to violate section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1970). This assertion is based on the assumption that the massagists would be forced either to employ people of only one gender if they had to comply with the ordinance, or to deprive individuals of employment opportunities because of their sex. In either case, the owners claim, they would be required to breach the duty set out in the Civil Rights Act.

4. The city officials' brief does not address that portion of the district court's opinion resting upon the irrebuttable presumption/due process doctrine; nor was this issue discussed at oral argument.

Basing their third challenge upon the equal protection clause, the massagists contend that City Council carved out wholly irrational exceptions to the ordinance. Specifically, they point out that section 9-610(5) exempts massage treatments given under the direction of a medical practitioner. The argument is that some individuals who massage persons of the opposite sex will, concededly, engage in lewd behavior; that such behavior does not depend upon the presence or absence of a supervising physician; and that a legislative body could not rationally determine that it does. The argument continues that the exemption set forth in the ordinance is thus not reasonably related to the legitimate governmental interest in prohibiting illicit sexual activity, and that, consequently, the ordinance must fall under the equal protection clause.

Plaintiffs' fourth claim is that the ordinance abridges the fundamental right to pursue a livelihood by disenabling every licensed massagist from serving approximately fifty per cent of the public. This challenge proceeds in the following manner: people have a constitutional right to pursue a lawful livelihood, such as the massage business, without being arbitrarily limited by any legislative body; strict judicial scrutiny of any restrictive legislation is therefore required; the city has failed to sustain its burden of demonstrating a compelling interest in the prohibition created by section 9-610(4); and the presence of less restrictive means of achieving the same goal attests to the fact that there is no strong governmental interest in the ordinance as it now stands.

The fifth argument by the plaintiffs is that the ordinance establishes an irrebuttable presumption that persons massaging someone of the opposite sex are likely to engage in illegal sexual acts. This is asserted to be an irrational presumption, so that the ordinance consequently violates due process.[5]

5. This contention is nearly identical with that which is noted above and identified as the second branch of the massagists' first major argument.

Finally, the plaintiffs claim that the ordinance encroaches upon an area—sex offenses—over which the Pennsylvania Legislature has intended to exert sole control. And, they assert, the city's attempt to legislate in this preempted field thus violates due process and is necessarily invalid.

III.

The Supreme Court's decision last term in Hicks v. Miranda, 43 U.S.L.W. 4857 (U.S. June 24, 1975), is dispositive of most of the plaintiffs' contentions in this case.

There is no longer any doubt that a dismissal of an appeal by the Supreme Court for want of a substantial federal question is an adjudication on the merits. *Hicks,* which decided this issue, arrived in the Supreme Court in a rather complicated procedural posture. After entry of state court judgments that the film "Deep Throat" is obscene under the California obscenity statute, Miranda and others filed an action in the federal district court seeking declaratory relief and an injunction against the statute's enforcement. A three-judge district court declared the California statute unconstitutional and granted relief. The defendant state officials subsequently moved for rehearing, for amendment of the judgment, and for relief from the judgment. In support they cited the order of the Supreme Court in Miller v. California, 418 U.S. 915 (1974). The *Miller* case was decided subsequent to entry of the three-judge court's judgment in *Hicks.* In *Miller,* the Supreme Court dismissed for want of a substantial federal question an appeal from a California court decision upholding the constitutionality of the obscenity statute that the three-judge court had just declared unconstitutional.[6] Upon

6. Appellants in *Miller* had taken an appeal under 28 U.S.C. § 1257(2) (1970), which provides:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court . . . [b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

denial of their motions by the district court, the state officials appealed to the Supreme Court.[7]

On appeal, the state officials argued that the *Miller* dismissal was binding on the three-judge court and should have led it to declare the California statute constitutional. The Supreme Court agreed with them.[8] Justice White, writing for the Court, held that *Miller* was properly within the Supreme Court's appellate jurisdiction under § 1257(2), leaving no discretion for the Court to refuse to decide the case on the merits. The Supreme Court had ruled that Miller's constitutional challenge to the California statute was not a substantial one, and "the three-judge court was not free to disregard [that] pronouncement."[9]

By parity of reasoning, we are not free to disregard three dismissals by the Supreme Court, for want of a substantial federal question, of challenges to ordinances identical in all material respects to the one in question here.

7. The Supreme Court had jurisdiction over the appeal by virtue of 28 U.S.C. § 1253 (1970).

8. The Supreme Court was required to decide the issue. If *Miller* was binding on the three-judge court, as appellants asserted, the merits of the claim would already have been decided, rendering the constitutional question "wholly insubstantial" and obviating the need for a three-judge court, Bailey v. Patterson, 369 U.S. 31, 33 (1962). This in turn would have eliminated the Supreme Court's § 1253 jurisdiction over that issue, Hagans v. Lavine, 415 U.S. 528, 543-45 (1974); Perez v. Ledesma, 401 U.S. 82, 86-87 (1971), leaving the Supreme Court unable to hear that part of the case. The necessity of ruling on the issue makes it clear that the Court's discussion of it was not dicta, but a holding which we are obliged to follow.

The fact that the Supreme Court actually took § 1253 jurisdiction in *Hicks* does not change this result. Jurisdiction was based upon an appeal from the three-judge court's decision on a separate challenge to the California search warrant statutes, not addressed in *Miller.* 43 U.S.L.W. at 4861. The Supreme Court could hear a § 1253 appeal on that basis.

Although Justice Stewart wrote that "[t]here are many aspects of the Court's opinion that seem . . . open to serious challenge," his dissent, joined by three other Justices, was directed solely to a separate issue in the case. 43 U.S.L.W. at 4863. Thus, the Court was unanimous on the meaning of a dismissal for want of a substantial federal question.

9. 43 U.S.L.W. at 4860. The *Hicks* holding was limited, as it had to be, to situations in which the issues in a given case and those in the case previously disposed of by dismissal for want of a substantial federal question "were sufficiently the same that [the latter] was a controlling precedent." This requires a determination of "what issues had been properly presented in [the latter case] and declared by [the Supreme] Court to be without substance." *Id.* n.14.

A reading of the appeal papers shows that the orders dismissing the appeals in *Smith v. Keator,*[10] *Rubenstein v. Cherry Hill,*[11] and *Kisley v. City of Falls Church*[12] are precedent for rejecting all but two of the contentions raised in opposition to section 9-610(4) of the Philadelphia Code.[13] The dismissals by the Supreme Court in these three cases dispose of the plaintiffs' claims based upon equal, but reprehensible, treatment of both sexes;[14] an invidiously discriminatory sex-based classification;[15] an irrational exception in the ordinance for massage treatments given under the direction of a medical practitioner;[16] unreasonable abridgement of the right to pursue a legitimate livelihood;[17] and the irrebuttable presumption doctrine.[18] Our

10. 419 U.S. 1043, *dismissing for want of a substantial federal question* 285 N.C. 530, 206 S.E.2d 203 (1974).

11. 417 U.S. 963 (1974), *dismissing for want of a substantial federal question* No. 10,027 (N.J. Sup. Ct., Jan. 29, 1974).

12. 409 U.S. 907, *dismissing for want of a substantial federal question* 212 Va. 693, 187 S.E.2d 168 (1972).

13. The appeals in *Smith, Rubenstein,* and *Kisley* were all brought under § 1257(2), *see* note 6 *supra,* as was the appeal in *Miller,* discussed in the *Hicks* opinion.

Patterson v. City of Dallas, 372 U.S. 251 (1963), *dismissing for want of a substantial federal question* 355 S.W.2d 838 (Tex. Civ. App. 1962), cited in the city officials' brief, is not apposite. Although it involved a challenge to the application of an ordinance nearly identical to § 9-610(4), the factual record was a critical aspect of the case. It thus has no applicability to the constitutionality, on its face, of § 9-610(4).

14. Jurisdictional Statement at 3, 8, Rubenstein v. Cherry Hill, 417 U.S. 963 (1974).

15. Jurisdictional Statement at 10, Smith v. Keator, 419 U.S. 1043 (1974); Jurisdictional Statement at 3, 7, Rubenstein v. Cherry Hill, 417 U.S. 963 (1974).

16. Jurisdictional Statement at 3, 7, Kisley v. City of Falls Church, 409 U.S. 907 (1972). *Kisley* involved an exemption for massages given in beauty parlors and barber shops. This is similar enough to the present exemption for application of the *Hicks* rule.

17. Jurisdictional Statement at 2-3, 7, Kisley v. City of Falls Church, 409 U.S. 907 (1972). Counsel cited New State Ice Co. v. Liebmann, 285 U.S. 262 (1932), for this challenge to the ordinance. While the *Kisley* dismissal disposes of this issue, we note that *New State Ice* was handed down during the era when the now long-discarded doctrine of substantive due process in the economic field was still in ascendance. It is thus of questionable relevance today. Ferguson v. Skrupa, 372 U.S. 726, 730-32 (1963). *See also* Kahn v. Shevin, 416 U.S. 351, 356 n.10 (1974); North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 164-67 (1973); Dandridge v. Williams, 397 U.S. 471, 484-85 (1970).

18. Jurisdictional Statement at 10, Rubenstein v. Cherry Hill, 417 U.S. 963 (1974).

reasoning in reaching this conclusion is supported by the similar approach taken by the Fourth Circuit in its recent decision in *Hogge v. Johnson.*[19]

Two contentions by the plaintiffs remain. The first is the claim based on the Civil Rights Act of 1964. The owners' argument is that compliance with section 9-610(4) of the ordinance would force them to breach section 703(a)(1)[20] and section 703(a)(2)[21] of the Act, which respectively prohibit refusal to hire and deprivation of employment opportunities on the basis of sex. That claim must fail, however, at least in this case. This is so because section 703(a) of the Civil Rights Act applies only to employment practices by an "employer," and section 701(b)[22] defines an employer as "a person . . . who has fifteen or more employees. . . ." It is neither alleged nor in any way suggested that any of the owners employ this number of persons. There is thus no violation of the Civil Rights Act.

The plaintiffs also assert that the City's power to legislate in the area of sex offenses is preempted by state legislation. *See, e.g.,* 18 Pa. Stat. Ann. §§ 3121-27, 5901-04 (1973). They urge us to follow the ruling to that effect delivered in an analogous situation by the California Supreme Court in *Lancaster v. Municipal Court,*[23] and further claim that the city's enactment and enforcement of an ordinance in this preempted area violates due process.

Under Pennsylvania law, a municipality is not prohibited from legislating in a particular field of the law "unless the Commonwealth has explicitly claimed the authority itself, or unless there is such actual, material conflict between the state and local powers that only by striking down the local power can the power of the wider constituency be protected."[24] Although the city ordinance

19. No. 74-1656, 74-1657 (4th Cir., Aug. 19, 1975).

20. 42 U.S.C. § 2000e-2(a)(1) (1970).

21. 42 U.S.C. § 2000e-2(a)(2) (Supp. III, 1973).

22. 42 U.S.C. § 2000e(b) (Supp. III, 1973).

23. 6 Cal.3d 805, 494 P.2d 681, 100 Cal. Rptr. 609 (1972).

24. United Tavern Owners v. Philadelphia School District, 441 Pa. 274, 280, 272 A.2d 868, 871 (1971).

supplements state legislation regarding sex offenses, we cannot say that the ordinance must be struck down under this standard. Since the local legislation is valid, its enforcement does not violate due process either.

The judgment of the district court will be reversed.[25]

25. The district court did not have the benefit of the Supreme Court's ruling in *Hicks v. Miranda* when it entered its judgment.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B
OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COLORADO SPRING AMUSEMENTS, LTD. t/a VELVET TOUCH and

LAUREL BEZNER, JACQUELINE BELL, GERALDINE STEVENS, SANDRA C. ROWLAND, et al.

v.

MAYOR FRANK RIZZO, POLICE COMMISSIONER JOSEPH F. O'NEILL, POLICE OFFICERS POWELL DeVECCHIO and DeLOACH, et al.

CIVIL ACTION NO. 74-955

MAX RUBENSTEIN t/a PHILADELPHIA HEALTH CLUB

and

NICOLE JONES, DELORES REMENTER, JEANA NICHOLS, AND LENORE SPENCE

v.

Opinion and Order of the United States District Court

MAYOR FRANK L. RIZZO OF THE CITY OF PHILADELPHIA, EMMETT F. FITZPATRICK, DISTRICT ATTORNEY OF THE CITY, et al.

CIVIL ACTION NO. 74-2174

OPINION AND ORDER

VanARTSDALEN, J. December 5, 1974

An ordinance of the City of Philadelphia providing for the licensing and regulating of massage parlors, whereby employees of massage parlors are completely prohibited from massaging persons of the opposite sex has been challenged as being unconstitutional in Civil Action 74-955 (Velvet Touch) and Civil Action 74-2174 (Rubenstein). The challenged portion of the ordinance provides: — (Ordinance 9-610(4))

> *Prohibited Conduct.* No person employed or engaged in the business of masseur or masseuse shall treat a person of the opposite sex.

The quoted portion of the ordinance, on its face, violates both the "due process" and "equal protection" clauses of Section 1, Amendment 14 of the United States Constitution, irrespective of whether the proper standard to be applied is a "compelling governmental interest" or a "rational basis." Declaratory and injunctive relief will be granted in both actions.

On April 11, 1974 in Civil Action 74-955, plaintiffs, Colorado Springs, Ltd., t/a Velvet Touch and Laurel Benzer, et al., employees of the Velvet Touch, filed a "Complaint for

Opinion and Order of the United States District Court

Injunctive Relief, Declaratory Judgment and Money Damages" against the Mayor, Police Commissioner, Police Officers, Department of Health and Department of Licenses and Inspections of the City of Philadelphia. The complaint charges that Philadelphia Ordinance Bill No. 2524 (Nov. 1, 1963) Philadelphia Code 9-610(4), is unconstitutional on its face and as applied to plaintiffs.[1] On April 16, 1974, a hearing was held on a motion for a temporary restraining order and preliminary injunction. At that time an understanding between counsel was reached; *viz.*, the request for preliminary injunctive relief would not be pressed in exchange for the non-enforcement of 9-610(4), pending a determination of the constitutionality of the ordinance by this court. Plaintiffs' complaint was amended on April 23, 1974. A "Supplemental Complaint" was filed June 20, 1974 which charged defendants with enforcement of 9-610(4) against the plaintiffs in violation of the agreement. Plaintiffs sought to depose certain defendant police officers on July 10, 1974. Defendants through their counsel refused on the grounds that a criminal prosecution was pending against certain of the plaintiffs. Plaintiffs filed a motion for sanctions for failure to appear at a deposition. A conference was held on July 11, 1974 to resolve the disputes over continued enforcement of 9-610(4), scheduling of depositions, discovery and sanctions. At that conference all counsel agreed that the original stipulation of April 16, 1974 would remain effective and that 9-610(4) would not be enforced against the Velvet Touch, pending

1. Because a municipal ordinance is challenged, a district judge may decide the constitutional question without convening a three-judge court under 28 U.S.C. §2281. *Moody v. Flowers*, 387 U.S. 97 (1967); *Philadelphia Newspapers, Inc. v. Borough Council of Swarthmore*, 381 F. Supp. 228 (E.D. Pa. 1974).

determination of the validity of the ordinance, and that a decision on motions for discovery and sanctions would be postponed until after the constitutionality of 9-610(4) had been determined by the district court. Defendant through its counsel, Murray C. Goldman, Esquire, conceded that the standard to be used in assessing the constitutionality of 9-610(4) was "compelling state interest." Briefs were filed concerning the facial validity of 9-610(4).[2] The essential facts are not in dispute.

On August 21, 1974 in Civil Action 74-2174, a "Complaint for Declaratory Judgment, Injunctive Relief, and Money Damages" was filed by Max Rubenstein, t/a Philadelphia Health Club (Club) and Nicole Jones, et al., employees of the Club, against the Mayor, District Attorney, Commissioner of Police, Licenses and Inspections, and Health Departments of the City of Philadelphia as well as various police officers. The substance of this complaint is the same as in Velvet Touch with additional allegations in *Rubenstein* that plaintiffs come within the express exception to 9-610(4) because Max Rubenstein is a licensed physical therapist. (Section 9-610(5)(a) of the

2. The precedural posture of this case is not entirely clear. In *Velvet Touch* the plaintiffs' brief is in support of a motion for summary judgmen: while the defendants' brief is for declaratory judgment. The constitutional issue could be determined in either manner. There has been no brief filed on behalf of either side in *Rubenstein*. Because the cases are consolidated as related, counsel for plaintiffs and defendants are the same in both cases, and the determination of the issue can be made from the material before the court with the same effect in both cases, it is neither necessary to have the parties retitle their pleadings nor submit additional pleadings to include *Rubenstein*. See Fed. R. Civ. P. 1.

Ordinance.)[3] The cases were consolidated as related under Local Rule 3(c)(3). A hearing on a motion for a temporary restraining order in *Rubenstein* was held on August 22, 1974 at which time that motion was denied.

FINDINGS OF FACT

1. Bill Number 2524 was approved by the Mayor of the City of Philadelphia on October 1, 1963 and became effective on November 1, 1963 under Section 9-610 of the Philadelphia Code.

2. Colorado Springs Amusements, Ltd., operates a massage parlor, trading as Velvet Touch at 11 North Thirteenth Street, Philadelphia, Pennsylvania.

3. Plaintiffs Bezner, Bell Stevens, Rowland, Savage, Cooley, Hampton, Adams, Stone, Viola, Davis, Barnes and Dollar were employees of the Velvet Touch during March and April, 1974.

4. Max Rubenstein is a licensed physical therapist with a place of business known as the Philadelphia Health Club located at 101 N. 15th Street, Philadelphia, Pennsylvania.

5. Plaintiffs Spence, Rementer, Jones and Nichols were employees of the Philadelphia Health Club in April 1974.

3. §9-610(5) *Exemptions*. The provisions of this ordinance shall not apply to massage treatment given

(a) in the office of a licensed physician, osteopath, chiropractor or physical therapist

6. Defendant Rizzo is Mayor of the City of Philadelphia.

7. Defendant Fitzpatrick is District Attorney of the City of Philadelphia.

8. Defendant O'Neill is Police Commissioner of the City of Philadelphia.

9. Defendant Sabatini is Commissioner of the Department of Licenses and Inspections of the City of Philadelphia.

10. Defendant Weinberg was Solicitor of the City of Philadelphia during the first nine months of 1974.

11. Defendant Polk is Health Commissioner of the City of Philadelphia.

12. Defendants Roselli, Brenton, Powell, DeVecchio, DeLoach, Feldman, Lyons, English and Ford are members of the Philadelphia Police Department.

13. On March 15, 1974 plaintiffs Savage, Cooley, Hampton and Adams were arrested by defendants DeVecchio and DeLoach for violating 9-610(4).

14. Charges stemming from the March 15, 1974 arrest against Savage, Cooley, Hampton and Adams were discharged.

15. On March 25, 1974 defendant Shaw entered the Velvet Touch and arrested plaintiff Viola for violating 9-610(4).

16. Plaintiff Viola was subsequently found guilty of violating 9-610(4).

17. On April 8, 1974 defendant Lyons entered the Velvet Touch and arrested plaintiff Stone for violating 9-610(4).

18. On April 8, 1974 defendant English entered the Velvet Touch and arrested plaintiff Davis for violating 9-610(4).

19. On April 8, 1974, Philadelphia Police Officers entered the Velvet Touch and arrested an employee, Barbara Smith, a/k/a Marth Smith for violating 9-610(4).

20. Stone, Davis and Smith were subsequently found guilty of violating 9-610(4).

21. On April 9, 1974 defendant Ford entered the Velvet Touch and arrested plaintiff Viola for violating 9-610(4).

22. Plaintiff Viola was subsequently found guilty.

23. On April 14, 1974, plaintiffs Spence and Rubenstein were arrested at the Philadelphia Health Club by a Philadelphia Police Officer for violating 9-610(4).

24. Charges against Spence and Rubenstein were subsequently dismissed.

25. On or about May 16, 1974 defendant Ford entered the Philadelphia Health Club and arrested plaintiffs Rementer, Jones and Nichols for violating 9-610(4).

26. Plaintiffs Rementer and Nichols were arrested for indecent assault, Pa. Stat. Ann. tit. 18, §3126 (1973), by defendant Ford at the Philadelphia Health Club in connection with massages administered by them to male customers of the Philadelphia Health Club.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and the subject matter.

2. Plaintiffs have standing to sue.

3. Philadelphia Code 9-610(4) violates Section 1, Article 14 of the United States Constitution.

4. Plaintiffs are entitled to injunctive and declaratory relief.

DISCUSSION

Plaintiffs assert that the ordinance is unconstitutional because it conflicts with Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), and the Fourteenth Amendment of the United States Constitution both as to "due process" and "equal protection of the laws." A long settled doctrine dictates that federal courts "ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944), *accord, Rosenberg v. Fleuti*, 374 U.S. 449, 451 (1963); *Hurd v. Hodge*, 334 U.S. 24, 30 fn. 6 (1948). In this case the only

issue before the court involves contentions that the ordinance, on its face, is unconstitutional. The facts are not in dispute. An adjudication as to the constitutionality of the ordinance is thus unavoidable to a determination of this litigation.

CIVIL RIGHTS ACT — TITLE VII EQUAL EMPLOYMENT OPPORTUNITIES (42 U.S.C. §2000e)

Plaintiffs assert that Section 9-610(4) conflicts with Section 703, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a).[4] The contention is that sexually discriminatory employment practices will inevitably result from compliance with the ordinance in direct conflict with §2000e-2. Plaintiffs contend that the "supremacy clause" of Article 6 of the United States Constitution thereby invalidates the ordinance, rendering it unconstitutional. One recent federal district court case has unequivocably so held. *Cianciolo v. Members of City Council,*

4. 2000e-2. Unlawful employment practices—Employer practices

a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Knoxville, Tenn., 376 F. Supp. 719, 723 (E.D. Tenn. 1974).[5] *See also Joseph v. House*, 353 F. Supp. 367 (E.D. Va.), *aff'd sub nom.* Joseph v. Blair, 482 F.2d 575 (4th Cir. 1973), where enforcement of a similar ordinance was preliminarily enjoined.

On the present record, no determination can be made as to whether the ordinance conflicts with Title VII of the Civil Rights Act of 1964. Title VII appears to have been enacted under the power granted Congress by Article I, Section 8 of the United States Constitution to regulate interstate commerce. In any event, Title VII expressly defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . ." 42 U.S.C. §2000e(b). Because plaintiffs have neither alleged nor presented any proof or facts to establish that the plaintiffs, or any of them, were in any way engaged in interstate commerce, or that either massage parlor ever employed as many as fifteen persons,[6] I am unable to reach this claim.

FOURTEENTH AMENDMENT
"Equal Protection of the Laws"

Ordinances similar to the one in question, which prohibit persons engaged as massagers from administering massages to

5. *Cianciolo*, involving a Knoxville ordinance with provisions similar to the challenged provisions in the present cases, also squarely ruled the ordinance unconstitutional under the "equal protection clause" of the Fourteenth Amendment.

6. The recent decision of the Superior Court of the District of Columbia in *Geisha House, Inc. v. Wilson*, ——A.2d——, C.A. 6044-74, decided September 25, 1974, see 42 L.W. 2157, noted, under similar contentions, that Title VII of the Civil Rights Act of 1964 would be inapplicable because Geisha House, Inc. did not employ as many as fifteen persons.

persons of the opposite sex have been tested in repeated litigation. The decisions are not unanimous in their result or reasoning. As a broad generality, it may be observed that earlier state court decisions tended to uphold the constitutionality of such ordinances as being properly within the state's police power. The seminal case appears to be *Ex Parte Maki*, 56 Cal. App.2d 635, 133 P.2d 64 (1943). The rationale of *Maki* was premised upon the reasonable relationship between the ordinance in question and the legitimate police power of regulating illicit sexual activity.

> The ordinance applies alike to both men and women. If petitioner should receive only male patrons and do his own work or employ only masseurs, he would not violate the ordinance. If he should receive only female patrons and employ only masseuses to do his work, there would be no violation. The barrier erected by the ordinances against immoral acts likely to result from too intimate familiarity of the sexes is no more than a reasonable regulation imposed by the City Council in the fair exercise of police powers.

133 P.2d at 67. Various state courts followed the rationale of *Maki* in upholding similar ordinances.[7] *Smith v. Keator*,[8] 29

7. Maki was overruled by the California Supreme Court in 1972 in the case of *Lancaster v. Municipal Court for Beverly Hills*, 6 Cal.3d 805, 100 Cal. Rptr. 609, 494 P.2d 681 (1972), on the basis that the state penal statute prohibiting illicit sexual behavior preempted the field. Thus the California Court did not reach the Federal Constitutional claim.

8. *Smith* relied on *Cheeck v. City of Charlotte*, 273 N.C. 293, 160 S.E.2d 18 (1968), in which the North Carolina Supreme Court agreed with the *Maki* rationale but found the Charlotte ordinance unconstitutional because it exempted barber shops and Y.M.C.A.'s, an exemption the Court found arbitrary.

N.C. App. 162, 203 S.E. 2d 411 (1968); *Rubenstein v. Township of Cherry Hill,* Unreported Affirmance, N.J. Super Ct. Appellate Div., January 29, 1974, *appeal dismissed for want of substantial federal question,* ——U.S.——, 41 L.Ed. 2d 1136 (1974); *Kisley v. City of Falls Church,*[9] 212 Va. 693, 187 S.E.2d *168, appeal dismissed for want of a substantial federal question,* 409 U.S. 907 (1972); *Patterson v. City of Dallas,*[10] 355 S.W.2d 838 (Tex. Civ. App. 1962). See the cases cited in 51 ALR 3d 936 (1973) and 17 ALR 2d 1183 (1951).

My research has disclosed only two cases currently effective and neither overruled nor limited by later decisions which uphold ordinances similar to 9-610(4). Both are state court decisions — *Smith v. Keator, supra,* and *Rubenstein v. Township of Cherry Hill, supra.* However a substantial line of cases, presently effective, have held such ordinances unconstitutional. *J.S.K. Enterprises v. City of Lacey,* 6 Wash. App. 43, 492 P.2d 600, 607 (1971) *rehearing,* 6 Wash. App. 433, 493 P.2d 1015 (1972); *Geisha House, Inc. v. Wilson, supra; Cianciolo v. City of Knoxville, supra; Valley Health Systems, Inc. v. City of Racine,* 369 F. Supp. 97 (E.D. Wisc. 1973); *Corey v. City of Dallas,* 352 F. Supp. 977 (N.D. Tex. 1972). Moreover, I have failed to discover any decision by a federal court which upholds the validity of such an ordinance.

9. The identical ordinance was later preliminarily enjoined in *Joseph v. House, supra,* primarily on the ground of the supremacy of Title VII of the Civil Rights Act of 1964.

10. *Patterson* was followed in subsequent Texas decisions. *City of Houston v. Shober,* 362 S.W.2d 886 (Tex. Civ. App. 1962); *Cornell v. State,* 371 S.W. 2d 45 (Tex. Crim. 1963); *Gregg v. State,* 376 S.W.2d 763 (Tex. Crim. 1964). However, these cases were effectively overruled by *Corey v. City of Dallas,* 352 F. Supp. 977 (N.D. Tex. 1972), which held that a similar ordinance was unconstitutional.

Plaintiffs contend that the ordinance not only creates a classification based on sex, but also deprives them of an opportunity to engage in a legitimate occupation and therefore, in the absence of a compelling governmental interest, the ordinance is constitutionally invalid. The equal protection clause does not prohibit a state or municipality from passing laws which treat classes of people differently, but only from treating classes differently when the basis of the discrimination does not bear a rational relationship to a legitimate statutory objective. *Jefferson v. Hackney,* 406 U.S. 535 (1972); *Eisenstadt v. Baird,* 405 U.S. 438, 446-47 (1972); *Reed v. Reed,* 404 U.S. 71, 75-76 (1971). Therefore, the classification may not invidiously discriminate between and among classes of persons. *Schilb v. Kuebel,* 404 U.S. 357, 364 (1971). In *Dunn v. Blumstein,* 405 U.S. 330, 335 (1972), the Supreme Court suggested three factors to be considered: (1) the character or basis of the discrimination, (2) the interests of the individuals subject to the discrimination, and (3) the governmental interest at stake. If the facts reveal that either the basis of the classification is suspect, *i.e.,* invidious and/or the class of persons discriminated against is deprived of a fundamental right, then a compelling state interest and not a mere rational relationship between the legislation and a legitimate objective must be established to make the legislation constitutionally valid. *Dunn v. Blumstein, supra* at 335; *Schilb v. Kuebel, supra* at 365.

It is important, however, in attempting to classify cases into neat categories such as "rational basis" and "compelling interest", to be mindful that these categories are only heuristic devices. These tests have somewhat uncertain standards. In *Reed*

v. Reed, supra at 76, in which the rational basis test was used, the court stated that a classification based upon sex must be:

> reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. [citation omitted].

In a compelling state interest analysis the burden shifts to the government to show an interest so compelling that it outweighs the fact that the suspect class is discriminated against or there is a deprivation of a fundamental right. *Dunn v. Blumstein, supra* at 335. Applying the three factors of *Dunn v. Blumstein* to the instant case, it is clear that the discrimination is based solely on sex. The individuals subject to the discrimination are all persons employed by massage parlors and their interest is in their right to freely engage in a lawful business without arbitrary restraints. The governmental interest appears to be to protect against illicit and immoral sexual behavior between massagers and customers of the opposite sex.

I do not interpret any decision of the United States Supreme Court or the Third Circuit Court of Appeals as squarely holding that a legislative classification based on sex is so inherently suspect and invidious as to mandate application of the "compelling interest" test. However, both *Frontiero v. Richardson,*[11] 411 U.S. 677 (1973), and *Reed v. Reed, supra,*

11. In *Frontiero* four of the justices (Brennan, Douglas, White and Marshall) reasoned that a sex-based classification was inherently suspect.

indicate that the courts will carefully scrutinize classifications based on sex. *See also, Kohr v. Weinberger,* 378 F. Supp. 1299 (E.D. Pa. 1974) (3-Judge Court; *Weisenfeld v. Secretary of HEW,* 367 F. Supp. 981, 988 (D. N.J. 1973) (3-Judge Court).

The right to engage in a lawful business or profession without arbitrary restraints is a "fundamental right" within the protection of the Fourteenth Amendment. *New State Ice Co. v. Liebmann,* 285 U.S. 262 (1932); *Truax v. Raich,* 239 U.S. 33 (1915). In *Cianciolo v. Members of City Council, Knoxville, Tenn., supra* at 723, the court stated "[a]s the commercial enterprise of administering massages is, per se, a legitimate occupation, the city in this instance must show a compelling state interest before their ordinance can be upheld." *Corey v. City of Dallas, supra,* likewise held that the questioned ordinance infringed on the basic right to earn a livelihood and, therefore, had to be justified by a compelling governmental interest.

Municipalities have a legitimate interest in attempting to prohibit illicit sexual behavior. No case, so far as I am aware, has ever suggested the contrary. The defendants in their brief argue that this is a compelling interest, and attach excerpts of testimony of police and public health officials[12] concerning activities in massage parlors. Although these statements are not properly part of the record as evidence, they may, for purposes of this decision, be assumed to be factually correct. Nevertheless, these facts still do not establish a compelling reason for totally prohibiting all persons during the course of employment from administering a massage to a person of the opposite sex.

12. This testimony was given before the Philadelphia City Council on August 14, 1963 in conjunction with passage of 9-610(4).

Even under the "rational basis" test, the ordinance is constitutionally invalid. This test, requires as a minimum that there be a rational, logical, reasonable relationship between the prohibition and the object sought to be accomplished. The logic applied is that because some massagers have, may or will commit immoral or illicit sexual acts with customers of the opposite sex, all massagers must be prohibited from massaging customers of the opposite sex. To deny all the opportunity to engage in their chosen occupation with both sexes because some may use the practice as a subterfuge to perform illegal acts is unreasonable and arbitrary. *Corey v. City of Dallas, supra.* The logic behind 9-610(4) is analogous to the type of logic that condemns one as guilty by association. As *J.S.K. Enterprises v. City of Lacey, supra* at 607, observed, it is "stereotyping of the worst kind."

> It is saying, in effect, that because some women [or men] perform lewd acts in suana parlors that all massagists can be judged to be lewd if given the opportunity and therefore they cannot massage members of the opposite sex.

By analogy, it would be as rational to prohibit all business and professional associations between persons of the opposite sex where the business or profession requires private consultation such as lawyer-client, doctor-patient, nurse-patient, clergyman-parishioner, tutor-student. That the percentage or incidence of improper conduct on the part of one occupational classification may vary from another makes prohibition no less onerous to the honorable practitioner. By further analogy,

it might as logically be contended that to prevent illicit and immoral sexual activities not only between persons of the opposite sex but also between persons of the same sex, massage parlors and the occupations of masseurs and masseuses employed in massage parlors be totally prohibited.

Cases have suggested less restrictive or less onerous methods of prohibiting and preventing the illicit and criminal conduct sought to be outlawed. I do not deem it appropriate for the court to advise City Council as to methods by which such proper objectives may be achieved, but some cases have suggested ways in which the questioned legislation could be corrected to meet constitutional requirements. See *Corey v. City of Dallas, supra.*

"DUE PROCESS OF LAW"

Under a due process analysis, Ordinance 9-610(4) is similarly unconstitutional. The ordinance makes a conclusive presumption that all who massage persons of the opposite sex will engage in illicit sexual activity. For such a presumption to be constitutionally valid, the presumption must in fact be reasonable. *Tot v. United States,* 319 U.S. 463 (1943). Even though there is a legitimate purpose for the legislation, such legislation must fail if there is no reasonable factual basis for the enactment. *Cleveland Board of Education v. La Fleur,* 414 U.S. 632, 645 (1974); *U.S. Dept. of Agriculture v. Murry,* 413 U.S. 508, 514 (1973); *Vlandis v. Kline,* 412 U.S. 441 (1973); *Stanley v. Illinois,* 405 U.S. 645, 655 (1972). There is no evidence on the record from which a conclusion could be made that all persons

who massage a person of the opposite sex will commit an illicit sexual act. The above cited cases dealt with matters in which a person in a particular class was conclusively presumed to lack qualities essential for either engaging in a profession, receiving a benefit or raising a child. The presumptions were struck down because there was no reasonable factual basis for them. Rather in each case, due process required that a hearing be held before the individual be deprived of the right in question.

In a more apposite situation factually, *Leary v. United States*, 395 U.S. 6 (1969), the Supreme Court held unconstitutional legislation, 26 U.S.C. §176, which presumed that a person in possession of marijuana brought it into the country illegally, knew of the importation, and intended to defraud the United States. *Leary, supra* at 37. *Leary* may be analogized to the instant case because in both instances criminal activity is presumed. In *Leary* the standard enunciated was that

> a criminal statutory presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

Id. at 36. Again there is no evidence on the record from which I can conclude that illicit sexual activity will inevitably result if a masseur or masseuse massages a person of the opposite sex. The instant case is even more compelling than *Leary*, since in that case only a rebuttable presumption arose, while here there appears to be a conclusive presumption.

The ordinance precludes everyone, whether moral or immoral, from administering for compensation massages to persons of the opposite sex. The ordinance provides no opportunity for anyone to conduct such business, even though if properly conducted, such would be a legitimate business enterprise. The ordinance makes this blanket prohibition because the legislative body ascertained to its satisfaction that some person utilized such business for immoral and illicit sexual practices. In effect, therefore, to eradicate this evil, without affording any opportunity for one to establish that he or she would engage only in legal and legitimate massage practices, the legislative body conclusively presumed that all would engage in improper practices. This is prohibiting one from engaging in a legitimate business without due process of law.

The defendants, or some of them, acting through the Police Department of the City of Philadelphia have attempted to enforce the ordinance through prosecution as to its penal provisions. Even during the course of this litigation, there is evidence that certain of the police attempted a continued enforcement despite an agreement between counsel that none would be attempted until the present issue was decided. This may have been due to lack of communication or a misunderstanding. Nevertheless, it is apparent that vigorous enforcement may be attempted unless expressly prohibited by injunctive relief. Because the ordinance violates the United States Constitution, and enforcement would clearly cause irreparable harm to all plaintiffs, none of whom have an adequate remedy at law, injunctive relief is appropriate and will be granted. All outstanding motions for sanctions will be dismissed and denied.

Opinion and Order of the United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Same Title]

ORDER

AND NOW, this 5th day of December, 1974, upon motion for summary judgment and for declaratory and injunctive relief, it is

ADJUDICATED, ORDERED AND DECREED that Philadelphia Ordinance Bill No. 2524, Philadelphia Code 9-610(4) which provides that "No person employed or engaged in the business of a masseur or masseuse shall treat a person of the opposite sex" violates Section 1, Amendment XIV of the United States Constitution and is, therefore, unconstitutional, void and unenforceable in its entirety as to the quoted portion of the ordinance.

Plaintiffs' motions for summary judgment are granted, and judgment is entered in favor of plaintiffs and against defendants.

Defendants and all agents and employees of defendants are permanently enjoined from enforcing or attempting to enforce, by any means whatsoever, the quoted portion of said ordinance. This order shall not affect the validity or enforceability of any and all other portions of said ordinance.

All outstanding motions for sanctions are DENIED and DISMISSED.

BY THE COURT:

S/ Donald W. VanArtsdalen
J.

APPENDIX C
PHILADELPHIA ORDINANCE BILL NO. 2524, PHILADELPHIA CODE 9-610 and 9-611

AN ORDINANCE

amending Chapter 9 of the Philadelphia Code, relating to regulation of businesses, trades and professions, by adding section 9-610, pertaining to massage businesses and providing penalties for violations.

The Council of the City of Philadelphia hereby ordains:

SECTION 1. Chapter 9 of the Philadelphia Code relating to regulation of businesses, trades and professions is amended as follows:

§ 9-610. Massage Businesses.

(1) Licenses.

(a) No person shall operate any premises used in the massage business unless he has obtained a premises license for each establishment from the Department of Licenses and Inspections.

(b) No person shall engage in the business of, or be employed as, a masseur or masseuse unless he has obtained an operator's license from the department.

(2) Information. Each applicant for a premises license or an operator's license shall set forth on forms provided by the department:

(a) the name and address of the applicant and former addresses for a period of three years;

(b) a physical description of the premises used in the massage business if the applicant desires a premises license;

(c) a statement of past employers for three years if the applicant desires an operator's license;

(d) such other information that the department may require.

(3) Fee. The applicant for a licensed establishment shall pay an annual license fee of $25.00. The applicant for an operator's license shall pay an annual license fee of $10.00.

(4) Prohibited Conduct. No person employed or engaged in the business of a masseur or masseuse shall treat a person of the opposite sex.

(5) Exemptions. The provisions of this ordinance shall not apply to massage treatments given

(a) in the office of a licensed physician, osteopath, chiropractor, or physical therapist;

(b) in a regularly established medical center, hospital, or sanitarium;

(c) in a residence of a person under doctor's care by the direction of the doctor;

(d) upon the order of a licensed physician, osteopath, chiropractor or physical therapist.

(6) Penalties. In addition to any other sanctions or penalties provided by law, the penalty for violation of the provisions of this section shall be a fine of one hundred ($100.00) dollars for each offense together with imprisonment not exceeing thirty (30) days, if the fine and cost is not paid within five (5) days.

(7) This ordinance shall become effective thirty (30) days after its approval.

Approved the 1st day of October, A.D. 1963.

AN ORDINANCE

amending Chapter 9 of the Philadelphia Code, relating to the regulation of business, trade and professions, by providing for regulations of masseurs and masseuses, under certain terms and conditions, and providing penalties for violations.

The Council of the City of Philadelphia hereby ordains:

SECTION 1. Chapter 9 of the Philadelphia Code, relating to the regulation of business, trade and professions is amended as follows:

§ 9-611. Masseurs and Masseuses.

(1) Definitions

(a) Masseur. A licensed male or female person engaged in the business of, or employed as one massaging, manipulating, stimulating, exercising or performing similar work upon the human body with or without mechanical or electrical apparatus or appliances or medicinal substances.

(b) Master. A masseur who has successfully completed an examination administered by the Department of Health and has fulfilled requirements of an apprentice.

(c) Apprentice. A registered person serving under the direct supervision of a licensed master masseur.

(2) Requirements for License.

(a) No person shall engage in the business of, or be employed as a masseur master or apprentice unless he files a written application for registration with and on a form prescribed by the Department of Licenses and Inspections accompanied by a health certificate issued by a registered physician of Pennsylvania together with a registration fee of ten dollars ($10.00) and obtains a license from the Department of Licenses and Inspections.

(b) No person may be licensed as a master or apprentice masseur unless he has complied with the examination, educational and practical requirements as determined by the Department of Health.

(c) Any licensed master masseur may instruct apprentices, provided that there shall be not more than one apprentice for every licensed master operator. Apprentices shall register with and supply the Department of Licenses and Inspections the name and address of their master masseur and information required in order to determine their fitness and qualification as an apprentice. This shall become effective thirty (30) days after the results of the administration of the first examination for masters.

(d) One (1) year from the effective date of this ordinance, any licensed masseur may file for the first examination to be given by the Department of Health in order to qualify as a master masseur in lieu of an apprenticeship and other examinations may be given from time to time to masseurs who fail to so qualify.

(e) The entire license fee shall be paid by the applicant for the calendar year regardless of the date of issuance. The license may be renewed annually and shall be accompanied by the license fee and a certification from a registered licensed physician of Pennsylvania stating that the applicant is free from all contagious and infectious diseases.

(3) General Provisions:

(a) No licensed masseur, master or apprentice shall operate or massage persons while suffering from an infectious or contagious disease. Neither shall he serve any person afflicted with such diseases.

Philadelphia Ordinance Bill No. 2524, Philadelphia Code 9-610 and 9-611

(b) All licensees shall conspicuously display their certificate of registration or license.

(c) At least one (1) licensed master shall be in attendance at all times during the operation of a licensed establishment. This shall become effective thirty (30) days after the results of the administering of the first examination of masters.

(4) Penalties. In addition to any other sanctions or penalties provided by the law, the penalty for violation of any provisions of this section shall be a fine of one hundred ($100.00) dollars for each offense, together with imprisonment not exceeding thirty (30) days, if the fine and cost is not paid within five (5) days.

Approved the twenty-first day of June, A.D. 1967.

JAMES H. J. TATE,
Mayor of Philadelphia